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Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

MOHAMED F. EL-HEWIE, Pro Se,
Petitioner,

versus

BERGEN COUNTY, *ET AL.*,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner
MOHAMED F. EL-HEWIE,
Pro se.
157B Meriline Avenue,
West Paterson, NJ 07424
Phone: (973) 237-0530
Fax: (973) 237-0537

QUESTION PRESENTED

The United Stated Court of Appeals (USCA) for the Third Circuit erred in concluding that the nontenured teachers have no property interest in a job, in contradiction to the holdings of the Appellate Court of New Jersey that the state-approved, school district, teacher mentor plan was clearly intended to help provisional teachers to succeed and secure tenured appointments. This holding raises the following substantial federal question that warrants immediate review by this Court:

Whether the improper termination of alternate-route provisional teachers from the New Jersey State Provisional Teacher Program constitutes deprivation of property under the Fourteenth Amendment of the Constitution of the United States?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Mohamed F. El-Hewie, Petitioner;

2. Bradley M. Wilson; Respondent;

3. Ian C. Doris, Esq., Counsel for Respondent;

4. John R. Gonzo, Esq., Counsel for Respondent;

5. Melissa Thersa Dutton Esq., Counsel for Respondent;

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mohamed F. El-Hewie, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit For The Third Circuit. In plain contravention of the requirements of the Constitution of the United States and federal law, the United States Court of Appeals for the Third Circuit for the Third Circuit has embarked on an *ad hoc*, standardless, and lawless exercise of judicial power, which thwarts the considered judgments of New Jersey's executive and legislative branches. Because the hiring, training, and certifying alternate-route provisional teachers is governed directly by State School Law, the Appeal's panel's decision involves issues of the utmost federal importance in regard to the protection of the civil rights of future educators in public school.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit for the Third Circuit is attached as Appendix (App. 1 through 11). The opinions and orders of the United States District Court of New Jersey dismissing Plaintiff's complaints is attached in Appendix (App. 12 through 30).

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit for the Third Circuit was entered on September 17, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves 42 U.S.C. §§ 1981, 1983, 1985, 1986; N.J.S.A. § 18A:27-4.1a (pertaining to a board of education's appointment, transfer, or removal of officers and employees); and N.J.A.C. §§ 6A:9-8.3 ("Requirements for Instructional Certificate"), 6A:9-3.3 ("Professional Standards for Teachers"), and 6A:9-3.4 ("Professional Standards for School Leaders").

STATEMENT OF THE CASE

Petitioner Mohamed F. El-Hewie, proceeding pro se, appealed an order of the United States District Court for the District of New Jersey granting the defendants' motions to dismiss his federal claims and declining to adjudicate his state-law claims. The United States Court of Appeals for the Third Circuit for the Third Circuit affirmed in part, vacated in part, and remanded to the District Court for further proceedings.

This dispute arises out of a decision by the Board of Education of the Bergen County Vocational School District ("the Board") not to renew Petitioner's contract for employment as a provisional teacher for the 2006-2007 school year while petitioner was still in Phase-One of the Teacher Training Program. Petitioner was terminated from the Provisional Teacher Program of the State of New Jersey without fulfilling the state requirements of N.J.A.C. 6A:9-8.3, 8.4, 8.6, and 8.7. As such, Petitioner was thrown out of a teacher certification proceeding, with falsified mentoring documents, and without the complete three evaluations required by the State of New Jersey to certify or to deny certification of an alternate-route provisional teacher.

Petitioner filed a petition with the New Jersey Department of Education alleging that the Board discriminated against him and violated various state laws and regulations governing provisional teachers. Following a six-day hearing, an administrative law judge ("ALJ") dismissed the petition on February 27, 2008, concluding that Petitioner's claims were without merit. In particular, the ALJ held that "the Board [complied] with all of the statutory requirements governing the non-renewal of a teacher," that the Board's "decision not to renew the petitioner's employment is supported by substantial, credible evidence, and cannot be said to be arbitrary or capricious," and that, under standards applicable to New Jersey's Law Against Discrimination ("LAD"), the "petitioner has failed to shoulder his burden of proof with regard to any discrimination claim."

On April 10, 2008, the New Jersey Commissioner of Education affirmed the dismissal of Petitioner's claims. Petitioner's appeal to the state Board of Education apparently remains pending. See N.J.S.A. § 18A:6-27, repealed by L. 2008, c. 36, § 7 (eff. July 7, 2008).

Meanwhile, Petitioner filed a complaint in the United States District Court for the District of New Jersey, raising employment discrimination, civil rights, and state education law claims. Petitioner named as defendants: the Board, its members, administrators, and staff members ("the Board Defendants"); two private attorneys who represented the Board Defendants in the state administrative proceedings ("the Attorney Defendants"); the New Jersey Office of Administrative Law and the administrative law judge who presided over his case ("the Administrative Law Defendants"); and the New Jersey Department of Law and Public Safety, the New Jersey Department of Education and New Jersey's Commissioner and Acting Secretary of Education ("the State Defendants.").

The District Court held that El-Hewie did not have a protected property interest in renewal of his employment contract, concluded that the state administrative proceedings had a preclusive effect on his federal claims, and declined to hear his state-law claims.

Consequently, the District Court granted the defendants' motion to dismiss. This appeal followed.

The United States Court of Appeals for the Third Circuit for the Third Circuit has jurisdiction pursuant to 28 U.S.C. § 1291, and exercise plenary review over the District Court's grant of the Defendants' motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). See Phillips v. County of Allegheny, 515 F.3d 224, 230 (3d Cir. 2008).

The opinion of the United States Court of Appeals for the Third Circuit for the Third Circuit entails the following controversial point:

POINT ONE

CONFLICT EXISTS BETWEEN THE APPEAL'S PANEL'S OPINION ON THE PROPERTY RIGHTS OF NONTENURED TEACHERS AND THE STATE LAWS AND OPINION OF THE APPELLATE COURT OF NEW JERSEY ON THE ESSENTIAL ROLE OF MENTORING IN SECURING TENURE.

The Appeal's panel's affirmation of the dismissal of appellant's § 1983 due process claims (asserting that nontenured teachers have no property interest in a job and that a person must have more than a unilateral expectation of continued employment) conflicts with the following laws and opinions:

A. NEW JERSEY STATUTES - TITLE 18A 18A:28-5 (REQUIREMENTS FOR TENURE) - DISTINGUISH EMPLOYMENT IN TEACHING FROM OTHER PROFESSIONS.

N.J.S.A. 18A.28-5 distinguishes employment in public education from other professions, such as those of fire fighters, office mangers, or computer technicians. That law regulates the process of securing property right in public education as follows.

> "N.J.S.A. 18A:28-5. The services of all teaching staff members employed in the positions of teacher, principal, other than administrative principal, assistant principal, vice-principal, assistant superintendent, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services, school athletic trainer and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect and school business administrators shared by two or more school districts, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and

then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this Title, after employment in such district or by such board for:

(a) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or

(b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or

(c) The equivalent of more than three academic years within a period of any four consecutive academic years."

The Appeal's panel's decision, in the current legal action, overlooks the unique legal aspects of the profession of teaching described by N.J.S.A.18A:28-5. In stead, the Appeal's panel's decision relied on caselaws that are irrelevant to disputes in the profession of teaching, as follows.

1. In Elmore v. Cleary, 399 F.3d 279, 282 (3d Cir. 2005), where the Township, Pennsylvania ("Huntington") employed plaintiff as an office manager, plaintiff Elmore was not a teacher and her employment would not lead to tenure. As such, that caselaw could not apply to the property rights of teachers.

2. In Versarge v. Twp. of Clinton N.J., 984 F.2d 1359, 1370 (3d Cir. 1993) (concluding that training provided to volunteer firefighter did not establish

property interest), neither plaintiff acknowledges receiving monetary compensation for his services as a volunteer firefighter, nor would his position lead to tenure. Therefore, volunteer firefighters differ entirely from teachers, who are entitled to monetary compensation, state and federal regulation on licensure, and tenure attainment after three years of teaching, pursuant to N.J.S.A. 18A.28-5.

3. In Biliski v. Red Clay Consol. School Dist. Bd. of Educ., – F.3d –, 2009 (3d Cir. July 29, 2009), plaintiff was a computer technician employed by the Red Clay Consolidated School District Board of Education, who was neither required to possess a state license to perform his job, nor did he expect to attain tenure rights. (N.J.S.A. 18A.28-5 does not apply to computer technicians).

B. THE OPINION OF THE NEW JERSEY APPELLATE DIVISION IN LEANG V. JERSEY CITY BD. OF EDUC., 969 A.2D 1097, 1109 (N.J. 2009) RECOGNIZED MENTORING AS A PREREQUISITE FOR SUCCESS IN SECURING TENURE.

In Leang, although the Superior Court of New Jersey reversed the Appellate's decision on the issue of [contact] (by recognizing that Board of Education had no obligation to renew one year contract of non-tenured public school teacher), the Superior Court did not comment or reverse the Appellate's opinion on the merits of mentoring and training of teachers. On page 54 of the decision of Appellate Division, Leang, A-5777-05T5, on April 2, 2008, the Court stated the following:

> "Sopharie has presented facts from which a reasonable finder of fact might conclude that the Board's mentor program was part of Sopharie's contract because **that program was clearly intended to help provisional teachers to succeed and secure tenured appointments**."

In addition to being deprived from mentoring and provisional evaluations similar to Sopharie Leang, the current appellant differs from Sopharie Leang in that, this appellant was deprived from the Instructional Certificate of the State of New Jersey, by the fraudulent termination from the State Provisional Teacher Program.

C. NEW JERSEY N.J.A.C. 6A:9-8.3 (REQUIREMENTS FOR STATE-APPROVED DISTRICT TRAINING PROGRAMS) RECOGNIZED MENTORING AS A PREREQUISITE FOR SUCCESS IN THE INITIAL TEACHING EXPERIENCE.

The Appeal's panel's opinion on the role of mentoring conflicts with state law N.J.A.C. 6A:9-8.3, which held:

> "(a) Each district board of education shall be authorized to employ a provisional teacher ***after*** *its mentoring plan has been approved* pursuant to N.J.A.C. 6A:9-8.4(d) 3.
>
> (b) Each State-approved district training program shall provide *essential knowledge and*

skills through the following training:

1. A full-time clinical experience of no less than 20 days duration shall be provided by in-district personnel as described and approved in the district's local mentor plan and may be in joint sponsorship with other educational entities. **The clinical experience *shall prepare the novice teacher with the skills and knowledge to succeed in the initial teaching experience*** *and shall take place prior to the time at which the novice* teacher takes full responsibility for a classroom. This clinical experience shall provide *high quality pre-professional support, instruction and clinical experiences and study in those essential areas* of professional study pursuant to N.J.A.C. 6A:9-3.3. This requirement shall not apply to provisional teachers who hold a CEAS pursuant to N.J.A.C. 6A:9-8.1(b).

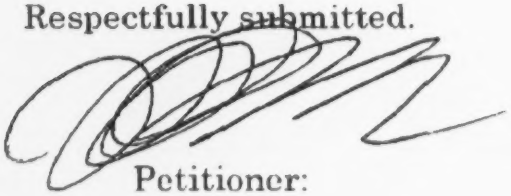
2. On-going mentoring of the provisional teacher shall take place over a period of 30 weeks in accordance with the local mentor plan pursuant to N.J.A.C. 6A:9-8.4 and in accordance with the Professional Standards for Teachers."

Wherefore, the Appeal's panel's opinion on the property right of teachers, in securing tenure through mentoring and training, conflicts with the opinion of other higher courts and state law, the Court should vacate or reverse the district court's dismissal of appellant's § 1983 due process claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.



Petitioner:

MOHAMED F. EL-HEWIE
157B Meriline Avenue,
West Paterson, NJ 07424
Phone: (973) 237-0530-
Fax: (973) 237-0537

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 08-4900

MOHAMED F. EL-HEWIE, Appellant

v.

BERGEN COUNTY; BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL SCHOOL DISTRICT; DENNIS MCNERNEY, Bergen County Executive; JACK DRAKEFORD, President of BOE; AARON R. GRAHAM, BCTS Board Member and Bergen County Superintendent; BERNI LYNN KOCH, BCTS Board Vice President; LAZARO CARVAJAL, BCTS Board Member; ANGELA TAYLOR, BCTS Board Member; ROBERT J. ALOIA, Superintendent; THOMAS KLEMM, Director of Human Resources; RAYMOND J. VOLPE, Supervisor; RICHARD PANICUCCI, Supervisor; PATRICIA T. COSGROVE, ex-school principal; RUSSELL DAVIS, vice principal; DENNIS MONTONE, supervisor; JOSEPH HOLBROOK, Teacher; LINDA EICKMEYER, Teacher; LINDA THEOS, Manager; BRADLEY M. WILSON, Board Attorney, and; WILLIAM C. SOUKAS, Board Attorney; ROBERT R. HIGGINS; NEW JERSEY OFFICE OF ADMINISTRATIVE LAW; HON. MARGARET M. MONACO; LUCILLE E. DAVY; DEPARTMENT OF LAW PUBLIC SAFETY DIVISION OF LAW; NEW JERSEY DEPARTMENT OF EDUCATION

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 08-cv-01760)
District Judge: Honorable Faith S. Hochberg

Submitted Pursuant to Third Circuit LAR 34.1(a)
September 11, 2009
Before: MCKEE, HARDIMAN AND COWEN, Circuit Judges

(Opinion filed: September 17, 2009)

OPINION

PER CURIAM

Mohamed F. El-Hewie, proceeding pro se, appeals an order of the United States District Court for the District of New Jersey granting the defendants' motions to dismiss his federal claims and declining to adjudicate his state-law claims. We will affirm in part, vacate in part, and remand to the District Court for further proceedings.

I.

This dispute arises out of a decision by the Board of Education of the Bergen County Vocational School District ("the Board") not to renew El-Hewie's contract for employment as a provisional teacher for

the 2006-2007 school year. El-Hewie filed a petition with the New Jersey Department of Education alleging that the Board discriminated against him and violated various state laws and regulations governing provisional teachers. Following a six-day hearing, an administrative law judge ("ALJ") dismissed the petition, concluding that El-Hewie's claims were without merit. In particular, the ALJ held that "the Board [complied] with all of the statutory requirements governing the non-renewal of a teacher," that the Board's "decision not to renew the petitioner's employment is supported by substantial, credible evidence, and cannot be said to be arbitrary or capricious," and that, under standards applicable to New Jersey's Law Against Discrimination ("LAD"), the "petitioner has failed to shoulder his burden of proof with regard to any discrimination claim." On April 10, 2008, the New Jersey Commissioner of Education affirmed the dismissal of El-Hewie's claims. [1] El-Hewie's appeal to the state Board of Education apparently remains pending. See N.J.S.A. § 18A:6-27, repealed by L. 2008, c. 36, § 7 (eff. July 7, 2008).

Meanwhile, El-Hewie filed a complaint in the United States District Court for the District of New Jersey, raising employment discrimination, civil

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[1] The New Jersey Supreme Court has noted that the Commissioner of Education and the Division of Civil Rights have concurrent jurisdiction in discrimination cases concerning education, but that "[b]ecause the discrimination occurs in a public education context, the Commissioner has the predominant interest in the subject matter." Balsley v. N. Hunterdon Reg'l Sch. Dist. Bd. of Educ., 568 A.2d 895, 902 (N.J. 1990).

rights, and state education law claims. [2] He named as defendants: the Board, its members, administrators, and staff members ("the Board Defendants"); two private attorneys who represented the Board Defendants in the state administrative proceedings ("the Attorney Defendants"); the New Jersey Office of Administrative Law and the administrative law judge who presided over his case ("the Administrative Law Defendants"); and the New Jersey Department of Law and Public Safety, the New Jersey Department of Education and New Jersey's Commissioner and Acting Secretary of Education ("the State Defendants.").[3]

The District Court held that El-Hewie did not have a protected property interest in renewal of his employment contract, concluded that the state administrative proceedings had a preclusive effect on his federal claims, and declined to hear his state-law

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[2] In particular, El-Hewie cited 42 U.S.C. §§ 1981, 1983, 1985, 1986; N.J.S.A.§ 18A:27-4.1a (pertaining to a board of education's appointment, transfer, or removal of officers and employees); and N.J.A.C. §§ 6A:9-8.3 ("Requirements for Instructional Certificate"), 6A:9-3.3 ("Professional Standards for Teachers"), and 6A:9-3.4 ("Professional Standards for School Leaders").

[3] El-Hewie's complaint also named Bergen County and the County Executive, Dennis McNerney. Those parties moved in this Court to be excused from filing a brief because El-Hewie makes "no mention of any errors by the District Court that would . . . [warrant] overturn[ing] the District Court's Decision as it pertains to the County of Bergen and Dennis McNerney." We granted that motion, and now hold that El-Hewie has waived his claims against those parties. See In re Surrick, 338 F.3d 224, 237 (3d Cir. 2003).

claims. [4] Consequently, the District Court granted the defendants' motion to dismiss. This appeal followed. [5]

II.

We have jurisdiction pursuant to 28 U.S.C. § 1291, and exercise plenary review over the District Court's grant of the Defendants' motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). See Phillips v. County of Allegheny, 515 F.3d 224, 230 (3d Cir. 2008). We accept as true all of the allegations contained in the complaint and draw reasonable inferences in favor of the plaintiff. See Erickson v. Pardus, 551 U.S. 89, 93-94 (2007) (per curiam). To survive dismissal, a complaint must contain sufficient factual matter, accepted as true, to

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[4] The District Court also concluded that the Attorney Defendants were immune from suit pursuant to the "litigation privilege," that the Administrative Law Defendants were entitled to judicial immunity, and that the State Defendants were immune from suit under the Eleventh Amendment. El-Hewie has waived any challenge to these determinations because he failed to meaningfully raise these issues in his opening brief. See Laborers' Int'l Union of N. Am. v. Foster Wheeler Energy Corp., 26 F.3d 375, 398 (3d Cir. 1994) ("An issue is waived unless a party raises it in its opening brief, and for those purposes a passing reference to an issue will not suffice to bring that issue before this court." (internal quotation marks omitted)).

[5] After El-Hewie appealed, he filed a motion for a new trial. We stayed the appeal pending disposition of that motion. The District Court denied the motion for a new trial by order entered February 19, 2009.

"state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). In deciding a motion to dismiss, a court may consider the allegations of the complaint, exhibits attached thereto, and matters of public record, including administrative decisions. See Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd., 181 F.3d 410, 426-27 (3d Cir. 1999); Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc., 458 F.3d 244, 256 n.5 (3d Cir. 2006) (rejecting argument that district court should have converted motion to dismiss into one for summary judgment where it considered preclusive effect of Trademark Trial and Appeal Board opinion).

III.

To prevail on his § 1983 claim, El-Hewie must demonstrate that the named defendants acted under color of state law and deprived him of rights secured by the Constitution or federal law. See Sameric Corp. of Del., Inc. v. City of Philadelphia, 142 F.3d 582, 590 (3d Cir. 1998). El-Hewie alleged that the defendants "frustrate[d] Plaintiff's efforts to enjoy his rights of equal employment and participation in the state approved teacher preparation program." It is well-settled that "[t]o have a property interest in a job . . . a person must have more than a unilateral expectation of continued employment; rather, she must have a legitimate entitlement to such continued employment." Elmore v. Cleary, 399 F.3d 279, 282 (3d Cir. 2005) (citing Bd. of Regents v. Roth,

408 U.S. 564, 577 (1972)). State law determines whether a person has such an entitlement. Id.

Pursuant to New Jersey law, "[a] nontenured officer or employee who is not recommended for renewal by the chief school administrator shall be deemed nonrenewed." N.J.S.A. § 18A:27-4.1b; see also Leang v. Jersey City Bd. of Educ., 969 A.2d 1097, 1109 (N.J. 2009) (recognizing that Board of Education had no obligation to renew one year contract of non-tenured public school teacher). El-Hewie, who alleged that he was hired pursuant to a "teacher preparation program," see N.J.S.A. § 18A:26-2a, entered into a "10-month, Non-Tenured Teachers Contract." That contract provided that it "may be terminated by either party giving to the other sixty (60) days notice in writing of intention to terminate the same." An at-will employee does not have a constitutionally protected property interest in continued employment. See Biliski v. Red Clay Consol. School Dist. Bd. of Educ., – F.3d –, 2009 WL 2245244, at *4 (3d Cir. July 29, 2009). We disagree with El-Hewie's contention that the "mentoring and training" provided to provisional teachers created a property interest protected by the Due Process Clause. Cf. Versarge v. Twp. of Clinton N.J., 984 F.2d 1359, 1370 (3d Cir. 1993) (concluding that training provided to volunteer firefighter did not establish property interest). Therefore, because El-Hewie had no property interest in his non-tenured teaching position, his § 1983 due process claims fail as a matter of law. [6]

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[6] We also conclude that the District 6 Court did not abuse its discretion in declining supplemental jurisdiction over

IV.

The District Court held that El-Hewie's employment discrimination claims under 42 U.S.C. § 1981 had been litigated before the ALJ, and were therefore barred by the doctrine of res judicata. Res judicata precludes claims that were actually litigated or could have been litigated in a prior action, see Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981), and can be applied to administrative agencies acting in a judicial capacity. See United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966). "[W]hen a state agency 'acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate,' . . . federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts." Univ. of Tenn. v. Elliott, 478 U.S. 788, 799 (1986) (quoting Utah Constr. & Mining Co., 384 U.S. at 422); see also Swineford v. Snyder County, 15 F.3d 1258, 1266 (3d Cir. 1994) (noting that "when adjudicating Reconstruction Civil Rights laws, federal courts give the same preclusive effect to state agency findings as would the state courts when the agency, acting in a judicial capacity, resolves disputed issues of fact."). We have recognized that "applying preclusive effect to legal conclusions made by state agencies 'is favored as a matter of general policy, [though] its suitability may vary according to

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El-Hewie's state law claims, which centered on the defendants' alleged "violat[ion] of the essential framework of N.J.A.C. [§] 6A:9-8.3 [("Requirements for Instructional Certificate")]." See 28 U.S.C. § 1367(c)(3); Figueroa v. Buccaneer Hotel Inc., 188 F.3d 172, 175 (3d Cir. 1999).

the specific context of the rights at stake, the power of the agency, and the relative adequacy of agency procedures.'" Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc., 159 F.3d 129, 135 (3d Cir. 1998) (quoting Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 109-10 (1991)).

Although the District Court concluded that the ALJ acted in a judicial capacity, it failed to address whether New Jersey courts would give preclusive effect to the decision reached in the administrative proceedings. See Caver v. City of Trenton, 420 F.3d 243, 259 (3d Cir. 2005) ("look[ing] to [New Jersey's] preclusion law in determining what effect, if any, the ALJ's determinations could have on . . . state law claims."). Accordingly, we will vacate the dismissal of El-Hewie's § 1981 claims on res judicata grounds, and will remand the issue for consideration by the District Court in the first instance. See Thompson v. County of Franklin, 15 F.3d 245, 253 (2d Cir. 1994) (remanding for consideration of res judicata issues). We express no opinion on the issue, but note that the New Jersey Supreme Court has recognized that "thorny questions have arisen in previous cases in respect of whether preclusion of a [Law Against Discrimination] complaint is appropriate when the same LAD claim allegedly was raised in an administrative litigation before an administrative agency having concurrent jurisdiction with the [Division of Civil Rights]." Hennessey v. Winslow Twp., 875 A.2d 240, 245 (N.J. 2005).

V.

To state a claim under 42 U.S.C. § 1985, a plaintiff must allege: (1) a conspiracy; (2) motivated by a racial or class-based discriminatory animus designed to deprive, directly or indirectly, any person or class of persons of the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to person or property or the deprivation of any right or privilege of a citizen of the United States. See Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971). El-Hewie alleged that a principal, teacher, and supervisor "manipulate[d] the mentoring of provisional teachers" so as to "exclude," "replace," and "hir[e]" teachers based on race. The District Court concluded that El-Hewie did "not plead any facts to indicate that [the] 'conspiracy' was motivated by race or class-based discriminatory animus." We agree that El-Hewie's "bare assertion[ ]" about "manipulat[ion]" in the provisional teachers program is a conclusion that, "much like the pleading of a conspiracy in Twombly, amount[s] to nothing more than a 'formulaic recitation of the elements'" of a civil conspiracy claim.[7] Ashcroft v. Iqbal, – U.S. –, 129 S. Ct. 1937, 1951 (2009) (quoting Twombly, 550 U.S. at 555). Accordingly, we will affirm the District Court's dismissal of El-Hewie's § 1985 claim.

VI.

For the foregoing reasons we will affirm in

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[7] This conclusion also applies to El-Hewie's claim under § 1986 because such a claim cannot succeed unless predicated on a valid § 1985 claim. See Rogin v. Bensalem Twp., 616 F.2d 680, 696 (3d Cir. 1980).

part, vacate in part, and remand the matter to the District Court for further proceedings consistent with this opinion. In particular, we will vacate that portion of the District Court's order that dismissed El-Hewie's § 1981 claims on res judicata grounds. [8]

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[8] El-Hewie's motion to compel the District 8 Court to expedite trial and to recuse the District Court judge is denied. The motion by Appellees William C. Soukas and Bradley M. Wilson for leave to file a sur reply brief is denied.

CLOSED

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MOHAMED F. EL-HEWIE, Plaintiff, *Pro Se* : vs. NEW JERSEY DEPARTMENT OF EDUCATION, et al., Defendants.	Civil Action No. 08-1760 (FSH) **OPINION AND ORDER** December 10, 2008

HOCHBERG, District Judge

This matter comes before the Court upon Motions to Dismiss (dkt #s 30, 37, 42) by all Defendants pursuant to Fed. R. Civ. P. 12(b)(6). The Court has reviewed the submissions of the parties without oral argument, pursuant to Fed. R. Civ. P. 78.

I. Background and Facts

On April 20, 2006, Plaintiff Mohamed El-Hewie, a non-tenured provisional teacher at the Bergen County Academies, received notification that he was not going to be extended an employment contract for the 2006-07 school year. In response, Plaintiff filed a petition with the New Jersey Commission of Education to contest his termination,

alleging discrimination, fraud, negligence, and conspiracy. A six day plenary hearing commenced, during which Administrative Law Judge Monaco ("ALJ") dismissed the Plaintiff's petition in a decision on March 3, 2008. On April 8, 2008 Plaintiff filed his Initial Complaint in this Court. Two days later, on April 10, 2008, the Commissioner of Education issued a Final Decision and dismissed the Plaintiff's claim, concurring with the ALJ. On April 15, 2008, the Plaintiff appealed the decision to the State Board of Education and the following day, filed his Second Amended Complaint in the instant action.

Plaintiff contends in his Complaint, *inter alia*, that Defendants failed to provide him teacher mentoring and training, and illegally declined to renew his teaching contract. Plaintiff alleges that Defendants' actions violated various federal civil rights laws, 42 U.S.C. §§ 1981, 1983, 1985, 1986, and state education laws, N.J.S.A. 18A:27-4.1a, N.J.A.C. 6A:9-8.3, N.J.A.C. 6A:9-3.3, and N.J.A.C. 6A:9-3.4. Plaintiff names as Defendants: Bergen County; the Board of Education of the Bergen County Vocation School District; the President of the Board of Education; the Bergen County Executive; board members of the school; the Superintendent; the Director of Human Resources; several supervisors; the former principal; the vice principal; two teachers; a manager; two attorneys for the board (collectively "Board Defendants");[1] the New Jersey Office of

[1] The claims against the attorneys who represented the Bergen County Board of Education of the Vocational Schools are dismissed because they are immune from suit pursuant to the litigation privilege. *Briscoe v. LaHue*, 460 U.S. 324, 334-35 (1983) (recognizing the common-law litigation privilege extends

Administrative Law ("OAL"); the Honorable Margaret M. Monaco, the administrative law judge who presided over his case; [2] the Department of Law and Public Safety; the New Jersey Department of Education; the Commissioner and Acting Secretary of Education (collectively "State Defendants").[3]

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not only to judges, government attorneys, and witnesses, but to private attorneys). The litigation privilege extends to communications "(1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." *Waterloov Gutter Protection Systems Co. v. Absolute Gutter Protection, LLC*, 64 F. Supp.2d 398 (D.N.J.1999). Plaintiff alleges that the Board attorneys somehow violated his rights while representing the Board during Plaintiff's non-renewal process, and in defending the Board against Plaintiff's claims. This is precisely the type of conduct anticipated by the litigation privilege and which it protects. Accordingly, the claims against the Board attorneys are dismissed.

[2] The claims against Administrative Law Judge Monaco and the OAL are dismissed because both are protected by the doctrine of judicial immunity. *Mireles v. Waco*, 502 U.S. 9, 11 (1991). As Plaintiff has not alleged any facts to indicate that the alleged inappropriate actions of Judge Monaco were taken outside her judicial capacity or in the absence of jurisdiction, the judicial privilege cannot be defeated. *Id.*

[3] Plaintiff's claims against the state defendants are barred by the Eleventh Amendment. *See Kentucky v. Graham*, 473 U.S. 159, 169 (1985); *see also Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 101-102 (1984) ("[A] suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief."). There is no question that the New Jersey Department of Education and the Department of Law and Public Safety are all entities or instrumentalities of the State, none of which have consented to suit. Therefore, each is entitled to immunity

II. Standard of Review

To survive a Rule 12(b)(6) Motion to Dismiss, "factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true even if doubtful in fact." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-1965 (2007). According to the Third Circuit, "stating . . . a claim requires a complaint with enough factual matter (taken as true) to suggest the required element. This does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element." *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (internal quotations omitted) (citing *Twombly*, 127 S. Ct. at 1965).

Although a court need not credit a complaint's "bald assertions" or "legal conclusions," it must view all of the allegations in the complaint as well as all reasonable inferences that can be drawn therefrom in the light most favorable to the plaintiff. *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) (citing *Rocks v. City of Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989)); *see also In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1429-30 (3d

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pursuant to the Eleventh Amendment. *Id.* Additionally, the individual state defendants, the Commissioner and Acting Secretary of Education were both sued in their official capacities. Accordingly, they are also immune from suit under the Eleventh Amendment. *Cory v. White*, 457 U.S. 85, 93 (1982); *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945).

Cir. 1997). The Supreme Court recently held that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Twombly*, 127 S.Ct. at 1969. In evaluating a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the Court may consider only the Complaint, exhibits attached to the Complaint, matters of public record, and undisputedly authentic documents if the Plaintiff's claims are based on those documents. *Pension Guaranty Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1992).

III. Analysis

A. Section 1983 Claim

To state a claim under § 1983, Plaintiff must allege facts which establish that: (1) he or she was deprived of a federal right secured by the Constitution, (2) by a person acting under color of state law. *Popow v. City of Margate*, 476 F.Supp. 1237, 1240 (D.N.J. 1979) (citing *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 150 (1970)). Regarding the second factor, "a plaintiff must establish as a threshold matter that he has a protected property interest in which the Fourteenth Amendment's due process protection applies." *Smith v. Township of East Greenwich*, 519 F. Supp.2d 493 (D.N.J. 2007).

Plaintiff claims to have "civil rights to teacher training and employment." However, the Court finds these are not viable property interests under the Constitution. Absent state statute or policy that

secures an interest in re-employment, an employee working under an employment contract has no property interest in the renewal of his contract. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 575 (1972). In finding that plaintiff's re-employment was not a viable property interest, the United States Supreme Court noted that "it stretches the concept too far to suggest that a person is deprived of liberty when he simply is not rehired in one job but remains as free as before to seek another." *Id.* In the instant case, Plaintiff was hired by the Board Defendants as a provisional teacher under a "10-month, Non-Tenured Teachers Contract." His contract did not contain any provisions guaranteeing him renewed employment with the Board and it also made clear that the contract could be terminated, without cause, on 60-days written notice. Therefore, the Court concludes that Plaintiff cannot state a claim under § 1983 because he did not have a property interest in renewal of his contract. *See Mozier v. Board of Educ. Of Cherry Hill Township*, 450 F. Supp. 742, 748 (D.N.J. 1977) (holding that a teacher's contract terminable at will by the school board, subject to 60 days' notice, did not create a property interest under the Fourteenth Amendment's due process clause).

Plaintiff's claim that he is entitled to teacher training pursuant to N.J.A.C. 6A:9-8 similarly fails because Plaintiff does not have a protected property interest in such training. "A violation of a state law duty, by itself, is insufficient to state a § 1983 claim." *D.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364, 1375 (3d Cir. 1992). Additionally, there is no New Jersey case law or statute to support

Plaintiff's claim that teacher training under the applicable New Jersey statutes and regulations are protected property interests. Indeed, New Jersey courts have found that failure of a school district to comply with evaluation requirements set forth in New Jersey statutes and regulations neither imposes a penalty on the district for noncompliance nor affords a provisional teacher either reinstatement or an award of damages. *Dore v. Board of Educ. Of the Township of Bedminster*, 185 N.J. Super. 447, 455-457 (App. Div. 2001).

Accordingly, Plaintiff has no protectible property interest in teacher training or renewal of his contract and the Court will dismiss Plaintiff's § 1983 claim.

B. Section 1981, 1985 and 1986 Claims

Plaintiff alleges an employment discrimination claim under § 1981. To establish a *prima facie* case of employment discrimination under § 1981, Plaintiff must demonstrate that:

> (1) [he] is a member of a protected class; (2) [he] satisfactorily performed the duties required by his position; (3) [he] suffered an adverse employment action, and (4) either similarly-situated non-members of the protected class were treated more favorably or the adverse job action occurred under circumstances that give rise to an inference of discrimination.

Wallace v. Federated Dep't Stores, 214 Fed. Appx. 142, 144-45 (3d Cir. 2007), *cert. denied*, 128 S. Ct. 311 (2007).

Plaintiff also claims that the Board Defendants conspired to interfere with his civil rights pursuant to 42 U.S.C. § 1985. To state a claim under § 1985, Plaintiff must allege:

> (1) a conspiracy; (2) motivated by a racial or class-based discriminatory animus designed to deprive, directly or indirectly, any person or class of persons to the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to person or property or the deprivation of any right or privilege of a citizen of the United States.

Lake v. Arnold, 112 F.3d 682, 685 (3d Cir. 1997).

Plaintiff is unable to state claims under §§ 1981, 1985 and 1986 [4] because this Court must give

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[4] Plaintiff's § 1986 claim fails because Plaintiff has not established that there was any violation under § 1985. Section 1986 is a companion to § 1985 and provides a cause of action against persons who, knowing that a violation of § 1985 is about to be committed and possessing the power to prevent its occurrence, fail to do so. *See Rogin v. Bensalem Tp.*, 616 F.2d 680, 696 (3d Cir.1980) (holding that if a claimant fails to set forth a cause of action under 42 U.S.C. §1985 then its claim under the companion statute 42 U.S.C. § 1986 must also fail); *Clark v. Clabaugh*, 20 F.3d 1290, 1295 (3d Cir.1994). Transgressions of § 1986 by definition depend on a preexisting violation of § 1985. Because Plaintiff cannot establish facts to show that the Board Defendants engaged in a race-based conspiracy designed to deprive him of the equal protections of the law.

the ALJ's fact-finding preclusive effect. *See University of Tennessee v. Elliot*, 478 U.S. 788, 800 (1986) (holding that federal courts must give fact-finding of state agency, acting in a judicial capacity while resolving disputed issues of fact properly before it which parties have had adequate opportunity to litigate, the same preclusive effect to which such fact-finding would be entitled in the state's courts).

The doctrine of issue preclusion, which has been utilized for more than a century, is premised on the theory that "once an issue has been resolved in a prior proceeding, there is no further fact-finding function to be performed." *Parklane Hosiery v. Shore*, 439 U.S. 322, 336 (1979). "The doctrine [of collateral estoppel] reduces the costs of multiple lawsuits, facilitates judicial consistency, conserves resources, and 'encourages reliance on adjudication.'" *Witkowski v. Welch*, 173 F.3d 192, 199 (3d Cir. 1999). In determining whether the doctrine of collateral estoppel should be applied, the United States Court of Appeals for the Third Circuit has determined that four necessary criteria should be considered: 1) the issue in the instant action must be identical to the issue in the prior action; 2) there must be a final decision on the merits in the prior action; 3) the party against whom collateral estoppel is asserted must have been a party, or in privity with a party, to the prior action; and 4) the party against whom estoppel is asserted must have had a full and fair opportunity to litigate the issue in the prior action. *See Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 357-58 (3d Cir. 1999).

Preclusive effect may be given to judgments of bodies other than courts of law. *Astoria Fed. Sav. And Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991). "[W]hen a state agency 'acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate,' federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts." *University of Tennessee*, 478 U.S. at 799. After considering the overall nature of the proceedings in the administrative forum, a federal court may give collateral estoppel effect to a state administrative agency if the proceedings provided the parties a full and fair opportunity to litigate the issues in question. *Allen v. McCurry*, 449 U.S. 90, 95 (1980). In *United States v. Utah Constr. and Mining Co.*, the United States Supreme Court set forth certain fairness requirements that a court must consider before determining that a decision by an administrative agency has preclusive effect on a subsequent action. 384 U.S. 394, 422 (1966). These fairness requirements include determining whether 1) the administrative agency acted in a judicial capacity; 2) the agency resolved disputed issues of fact properly before it; and 3) the parties had an adequate opportunity to litigate. Id. Where these fairness requirements are in fact met, courts have given administrative decisions preclusive effect. *See In re McNallen*, 62 F.3d 619, 624 (4th Cir. 1995); *Miller v. County of Santa Cruz*, 39 F.3d 1030 (9th Cir. 1994); *Delamater v. Schweiker*, 721 F.2d 50 (2d Cir. 1983).

Turning to the case before the Court, this court must now determine whether the ALJ's decision should be given preclusive effect. Plaintiff filed a petition with the New Jersey Commission of Education to contest his termination asserting, *inter alia*, that he was discriminated against when his employment contract was not extended. A six-day plenary hearing commenced before the ALJ. The administrative proceedings, including the hearing and the decision by the ALJ, were judicial in nature and meet the standard set forth in *Utah Construction*.

The hearing had all the same procedural rights of a judicial proceeding. The ALJ conducted a hearing over six days that was adversarial in nature. Discovery was conducted. Witnesses testified under oath and were subject to cross-examination. Plaintiff had the opportunity to submit documents and other materials into evidence. At the conclusion of the six-day hearing, the presiding ALJ wrote a reasoned opinion. Clearly, the parties had an adequate opportunity to litigate the exact issues in dispute in this case.

After the lengthy hearing, the ALJ made certain factual determinations: (1) the Board Defendants provided to Plaintiff substantial mentorship and teacher training; (2) despite all of the mentoring and training, Plaintiff's work performance was deficient throughout his employment; (3) because of his deficient work performance, the Board Defendants decided not to renew Plaintiff's employment contract; and (4) the factual record was completely bereft of any evidence

to support a claim of discrimination. In making these findings, the ALJ determined that Plaintiff "failed to comply with a number of responsibilities of his position," and that Mr. Holbrook, another teacher, met with Plaintiff on at least 50 occasions in an attempt to mentor him. [5] Under the circumstances in this case, the Court concludes that the administrative hearing at issue qualifies as an "administrative agency acting in a judicial capacity" for preclusion purposes. *Utah Constr.*, 384 U.S. at 422.

The required four elements of issue preclusion have been met: 1) the issue was decided in the prior adjudication; 2) there was a final decision on the merits; 3) the party against whom the doctrine is asserted was a party to the prior adjudication; and 4) that party had a full and fair opportunity to litigate the precise issue in the prior litigation.

The Court finds that the issue to be litigated in this action - whether Defendants' articulated reason for not renewing Plaintiff's contract, poor work performance, was pretextual and not the true reason for deciding not to renew the contract - was

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[5] In so finding, the ALJ rejected Plaintiff's "false mentoring claim," the only conceivable claim upon which Plaintiff could possibly base his conspiracy claim under § 1985. Plaintiff alleges two other conspiracies: one related to the hiring of a new principal after Plaintiff no longer worked at the school and another related to the Board Defendants failure to execute the state-approved mentoring plan. However, neither can possibly form the basis of a § 1985 claim because Plaintiff does not plead any facts to indicate that either "conspiracy" was motivated by race or class-based discriminatory animus.

the precise issue before the ALJ. The Court next finds that there was a final decision on the merits because the Commissioner of Education has already affirmed the ALJ's decision. *See* N.J.S.A. 18A:6-9.1. There is no question that Plaintiff and Defendants were parties to the prior action. Plaintiff does not dispute that he had a full and fair opportunity to litigate the issues in question during the prior proceeding nor that the proceedings before the ALJ were judicial in nature. Accordingly, the Court finds that Plaintiff had a full and fair opportunity to litigate the issues in question.

The basic tenets of collateral estoppel are satisfied in this case and this Court concludes that the doctrine of issue preclusion is properly applied in this case. Under these circumstances, plaintiff may not relitigate the truthfulness of Defendants' stated reason for non-renewal of his employment contract or whether Plaintiff performed his job satisfactorily. Accordingly, Defendants' motions to dismiss for failure to state a claim are granted. [6]

C. Remaining State Claims

Pursuant to 28 U.S.C. § 1367(c)(3), the "district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . the district court has dismissed

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[6] In light of this disposition, Plaintiff's request for a Preliminary Injunction (dkt #14) to enjoin defendants from publically emanating the decisions pertaining to Plaintiff's grievance is denied.

all claims over which it has original jurisdiction". Having dismissed all of Plaintiff's claims over which it had original jurisdiction, the Court declines to exercise supplemental jurisdiction over Plaintiff's remaining claims, all of which arise under New Jersey state law.

IV. Order

ACCORDINGLY it is this 10th day of December, 2008

ORDERED that Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint (dkt. #s 30, 37, 42) on Plaintiff's §§ 1981(a), 1983, 1985 and 1986 claims are **GRANTED**; and it is further

ORDERED that Plaintiff's request for a Preliminary Injunction (dkt #14) is **DENIED**; and it is further

ORDERED that Plaintiff's remaining state law claims are **DISMISSED** without prejudice; and it is further

ORDERED that this case is **CLOSED**.

/s/ Faith S. Hochberg

HON. FAITH S. HOCHBERG, U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MOHAMED F. EL-HEWIE, Plaintiff, *Pro Se* vs. NEW JERSEY DEPARTMENT OF EDUCATION, et al., Defendants.	Civil Action No. 08-1760 (FSH) **OPINION AND ORDER** February 18, 2009

This matter having come before the Court upon Plaintiff El-Hewie's motions for recusal of the undersigned, a new trial pursuant to Fed. R. Civ. P. 59(b) [1] and an expedited oral hearing on the motion

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[1] No trial was held in this matter; consequently, rule 59(b) is inapplicable to this matter. The Court therefore assumes that Plaintiff intended his motion to be brought under Fed. R. Civ.
P. 59(e), a motion to alter or amend a judgment. Although 59(e) permits for amendment of a judgment, there is no express provision in the Federal Rules of Civil Procedure for reconsideration of a judicial decision, United States v. Compaction Sys. Corp., 88 F.Supp.2d 339, 345 (D.N.J. 1999). In this District, however, Local Rule 7.1(i) creates an explicit mechanism by which a party can ask a judge to take a second look at any decision for certain specific reasons. Therefore, Local Rule 7.1(i) governs motions for reconsideration and the Court will treat El-Hewie's motion as such.

for a new trial [2]; and the Court having received opposition to these motions by Defendants; and the Court having considered these motions without oral argument pursuant to Fed. R. Civ. P. 78; and

the Court finding that Plaintiff has failed to allege any valid reason for recusal of the undersigned; and

the Court therefore finding it is appropriate to deny this motion; and

it appearing that Local Civil Rule 7.1(i) provides for the reconsideration of an order if the motion is filed within 10 days after entry of the disputed order; and

it appearing that the purpose of a motion for reconsideration is "to correct manifest errors of law or fact or to present newly discovered evidence," Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985); see also, Shoenfeld Asset Mgt. v. Cendent Corp., 161 F. Supp. 2d 349, 352 (D.N.J. 2001), Yurecko v. Port Authority Trans-Hudson, 2003 WL 22001196 at * 2 (D.N.J. Aug. 18, 2003); and

it appearing that Local Civil Rule 7.1(i) requires that the moving party set forth "concisely the matters or controlling decision which counsel believes the [Court] has overlooked," G-69 v. Degnan,

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[2] Because the Court finds no valid reason to grant El-Hewie's motion for a new trial, his request for an expedited oral hearing on this motion will also be denied.

748 F. Supp. 274, 275 (D.N.J. 1990); and

it appearing that "a party seeking reconsideration must show more than a disagreement with the Court's decision," G-69 v. Degnan, 748 F. Supp. at 275; and

it appearing that "a mere 'recapitulation of the cases and arguments considered by the court before rendering its original decision'" does not warrant reargument, Elizabethtown Water Co. v. Hartford Casualty Ins. Co., 18 F. Supp. 2d 464, 466 (D.N.J. 1998) (quoting Carteret Savings Bank F.A. v. Shushan, 721 F. Supp. 705, 709 (D.N.J. 1989)); and

it appearing that a court may grant a properly filed motion for reconsideration for one of three reasons: (1) an intervening change in the controlling law has occurred; (2) evidence not previously available has become available; or (3) it is necessary to correct a clear error of law or prevent manifest injustice, Database America v. Bellsouth Advertising & Publ'g., 825 F. Supp. 1216, 1220 (D.N.J. 1993) (citing Weyerhaeuser Corp. v. Koppers Co., 771 F. Supp. 1406, 1419 (D. Md. 1991)); see also, Carmichael v. Emerson, 2004 U.S. Dist. Lexis 11742 (D.N.J. May 21, 2004), Milletta v. United States, 2005 WL 1318867 (D.N.J. May 27, 2005); and

it appearing that a motion for reconsideration is improper when it is used "to ask the Court to rethink what it had already thought through -- rightly or wrongly," Ciba-Geigy Corp. v. Alza Corp., 1993 WL 90412, *1 (D.N.J. March 25, 1993); Oritani

Sav. & Loan v. Fidelity & Deposit Co., 744 F. Supp. 1311, 1314 (D.N.J. 1990), rev'd on other grounds, 989 F.2d 635 (3d Cir. 1993); and

it appearing that because reconsideration of a judgment after its entry is an extraordinary remedy, motions to reconsider or reargue are granted "very sparingly," Maldonado v. Lucca, 636 F. Supp. 621, 630 (D.N.J. 1986); and

it appearing that disagreement with the Court's initial decision as the basis for bringing a motion "should be dealt with in the normal appellate process, not on a motion for reargument," Florham Park Chevron, Inc. v. Chevron U.S.A.,Inc., 680 F. Supp. 159, 163 (D.N.J. 1988); and

it appearing that (1) there has been no intervening change in controlling law; (2) Appellant has not presented new evidence that was not available for the Court to consider; and (3) there has been no clear error of law or manifest injustice;

IT IS therefore on this 18th day of February, 2009,

ORDERED that El-Hewie's motion for the undersigned's recusal in this matter is **DENIED**; and it is further

ORDERED that El-Hewie's motion for a new trial is **DENIED**; and it is further

ORDERED that El-Hewie's motion for an expedited oral hearing on his motion for a new trial is **DENIED**.

/s/ Faith S. Hochberg

HON. FAITH S. HOCHBERG, U.S.D.J.